United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig - contains affidavit of mailing.

76-6031

To be argued by
CYRIL HYMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6031

WALTER WOE (a pseudonym), by his mother and guardian, WILMA WOE (a pseudonym), on behalf of themselves and all others similarly situated,

Appellants,

—against—

DAVID MATHEWS, individually and as Secretary of the United States Department of Health, Education and Welfare; THE UNITED STATES OF AMERICA; HUGH L. CAREY, individually and as Governor of the State of New York; LAWRENCE L. KOLE, M.D., individually and as Commissioner of Department of Mental Hygiene of the State of New York, MORTON B. WALLACH, M.D., individually and as Director of Brooklyn State Hospital; and THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR FEDERAL APPELLEES

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
CYRIL HYMAN,
Assistant United States Attorneys,
Of Counsel.

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BRIEF FOR FEDERAL APPELLEES

Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Neaher, *J.*) of January 16, 1976, which order dismissed appellants' claims against the United States Department of Health, Education and Welfare, and the United States

of America, and against the State of New York, its governor, the Commissioner of the New York Department of Mental Hygiene and the Director of Brooklyn State Hospital. *Woe* v. *Mathews*, 408 F. Supp. 419 (E.D.N.Y. 1976).

Statement of the Case

This case represents one of several attempts to challenge the conditions and level of care in state mental institutions by ostensibly attacking the constitutionality of various state and federal laws affecting involuntarily confined patients in state mental hospitals. The original plaintiffs in this case were Walter Woe, a 26-year-old black who was involuntarily civilly committed to Brooklyn State Hospital for diagnosed schizophrenia in May, 1975, and, Wilma Woe, his mother and guardian.[1] They brought this action individually and purportedly as a class on behalf of other involuntarily civilly committed patients against Caspar W. Weinberger, individually and as Secretary of the Department of Health, Education and Welfare (HEW) (the present Secretary is F. David Mathews); the United States of America; Hugh S. Carey, individually and as governor of the State of New York; Dr. Lawrence C. Kolb, individually and as State Commissioner of Mental Hygiene of the State of New York, Dr. Morton Wallach, individually and as director of Brooklyn State Hospital; and the State of New York.

In their complaint and amended complaint, the plaintiffs apparently raised three claims for relief. The first two claims, which were directed only against the state defendants, concerned state involuntary commitment procedures and an alleged constitutional right to adequate treatment. The third claim, as against the federal de-

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[1] Appellant Walter Woe died prior to the filing of his brief.

fendants, related to the right of involuntarily civilly committed mental patients between the ages of 21 and 65 in public institutions to receive Medicaid.

In appellants' first claim against the state defendants, they asserted that the State of New York is constitutionally mandated to provide adequate and active care to involuntarily civilly committed patients. They argued that there exists a two-tier system of mental hospital care where the lower tier institutions—primarily state mental hospitals—are inferior, overcrowded and inadequate, while private hospitals (the second tier) render superior care. They asserted that "state mental institution care at a $25.00 a day level is as a matter of law grossly inadequate both by common law and constitutional law standards of adequacy when compared with the more than $250.00 a day level of care in the general hospital." (Appellants' Brief, p. 18). Because of this asserted constitutional entitlement to treatment, the appellants specifically contended that New York State's mental hygiene laws are invidiously discriminatory and unconstitutional in that they limit involuntary institutionalization to allegedly inferior state mental institutions. They also alleged that because of a concatenation of factors—being severely mentally ill, being poor and being black—Mr. Woe had been involuntarily institutionalized at the lower tier facility, Brooklyn State Hospital, rather than at Downstate Medical Center, with an alleged superior staff and facilities. Mr. Woe stated that Downstate has a staff and patient population that is 90 percent white even though it is located in the center of a mental hospital catchment area serving a predominantly black population. The patients at Downstate, who are less sick, better educated and wealthier than Brooklyn State patients, are voluntarily hospitalized upon the referral of a physician (Appellants' Brief at pages 26-27). Mr. Woe charged that even though he has been involuntarily hospitalized ten times since 1970, he has never been considered for hospitalization at Downstate.

The appellants' second claim against the state defendants was that the New York mental hygiene laws are unconstitutional in not requiring an adequate level of care and treatment. The appellants also claim that the laws lack an enforcement mechanism to guarantee a "right to treatment."

The appellants direct their third claim against the federal defendants for allegedly irrationally and arbitrarily excluding all state mental hospital patients between the ages of 21 and 65 from Medicaid coverage.[2] The appellants claimed that since involuntarily civilly committed patients have a constitutional right to receive adequate care and treatment, the Medicaid exclusion violates the equal protection clause by serving to perpetuate the two tier mental care system.

The appellants' application for a class action was denied by the district court on July 31, 1975, with leave to renew pending determination of the need for a three-judge court. On September 26, 1975, both the federal and state defendants argued motions to dismiss the Woe complaint before Judge Neaher. Before the district court rendered its judgment on the Woe complaint, the appellants notified the defendants on November 17, 1975, of their motion to amend the complaint and for a preliminary injunction.

The motion for a preliminary injunction grew out of action taken by the Department of HEW. On November 18, 1975, the Secretary of HEW notified the Pilgrim Psychiatric Center in Brentwood, New York, that the Center and its patients would not be eligible for federal assistance under Medicaid or Medicare because of the Center's loss of accreditation by the Joint Committee on

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[2] The Medicaid Statute, 42 U.S.C. § 1396d(a), excludes such patients from receiving Medicaid benefits.

Accreditation of Hospitals (JCAH). The Department of HEW planned to send letters to those patients at the Center receiving Supplemental Security Income Benefits (SSI) informing them of the termination of SSI benefits because of the Center's ineligibility to receive federal assistance. The appellants then sought leave to amend their complaint to permit Frank Foe, a patient over 65 years old at Pilgrim Psychiatric Center to join Woe action as a plaintiff and to file new claims for relief against the Secretary of HEW and JCAH for the center's loss of accreditation, which resulted in the patients' loss of SSI benefits. The appellants also moved for a preliminary injunction and a temporary restraining order, pending the court's determination of an injunction, to enjoin the Secretary of HEW from sending notices to those patients who stand to lose SSI payments due to loss of accreditation of Pilgrim Psychiatric Center.[3]

On November 20, 1975, the district court issued a memorandum and order denying the appellants' motion for a temporary restraining order and reserving decision on appellants' request for leave to amend the complaint. The appellants appealed, and on November 21, 1975, obtained from the Clerk of this Court a restraining order enjoining the Secretary of HEW until November 24, 1975, from sending notices to patients of any state mental hospital advising them of their loss of SSI payments. After argument, this Court dismissed the appeal for lack of appellate jurisdiction to review the denial by the district court of appellants' application for a temporary restraining order. (Order dated November 24, 1975 by

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[3] In addition to the claim arising out of the JCAH accreditation, appellants also sought to amend their complaint by adding new defendants and an additional claim by alleging a conspiracy among JCAH, the State of New York and the federal defendants to confine poor, black and mentally ill patients in allegedly inferior State facilities thus violating their civil rights. See *Woe* v. *Mathews, supra,* 408 F. Supp. at 429-431.

Circuit Judges Moore and Timbers and District Judge Coffrin, Docket Number 75-8335).[4]

The district court, by its decision and order of January 16, 1976, dismissed the appellants' claim against the federal defendants relating to the irrational and arbitrary exclusion of all state mental hospital patients between the ages of 21 and 65 from Medicaid coverage by Congress, and dismissed appellants' claim against the state defendants relating to the unconstitutionality of the Mental Hygiene Law in not requiring an adequate level of treatment. The court also granted class certification in the remaining action against the state defendants, to include all those patients between the ages of 21 and 65 in state mental institutions but denied without prejudice the motions to amend the complaint.

ARGUMENT

POINT I

The district court correctly found the claim against the federal defendants to be insubstantial and properly dismissed the claim for lack of subject matter jurisdiction.

The appellants raise the argument that the statutory exclusion of state mental patients between the ages of 21 and 65 from Medicaid coverage[5] is arbitrary and irra-

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[4] Patients at the psychiatric center did not incur any actual loss of SSI payments because the psychiatric center subsequently obtained accreditation from the JCAH.

[5] 42 U.S.C. § 1396d (1970) provides:

> "(a) The term 'medical assistance' means payment of part or all of the cost of the following care and services . . . except [that] such term does not include—
>
> (B) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for tuberculosis or mental diseases."

tional and constitutes a violation of equal protection by furthering the alleged unequal, two-tier system of mental hospital care. They claim that this system operates to the disadvantage of the sicker, poorer and predominantly black mental patients. The federal defendants insist that this was the very same issue addressed in *Legion* v. *Richardson*, 354 F. Supp. 456 (S.D.N.Y. 1973), *aff'd sub nom. Legion* v. *Weinberger*, 414 U.S. 1058 (1973), *rehearing denied*, 415 U.S. 939 (1974), and that the claim must be dismissed for lack of subject matter jurisdiction.

A long standing principle in the federal courts is that courts lack jurisdiction over claims which otherwise might be entertained if the claims are "plainly insubstantial." *Levering & Garriques Co.* v. *Morrin*, 289 U.S. 103, 105 (1933); *Hagans* v. *Levine*, 415 U.S. 528, 534 (1974). A question may be constitutionally insubstantial either because it is "obviously without merit or clearly concluded by this Court's previous decisions." *McLucas* v. *De Champlain*, 421 U.S. 21, 28 (1975); *Ex Parte Poresky*, 290 U.S. 30, 32 (1933); *Goosby* v. *Osser*, 409 U.S. 512, 518-519 (1973). In the case at bar, the legal issue raised against the federal defendants and the factual issues as well are so similar, if not identical, to those decided in *Legion* v. *Richardson*, *supra*, that the appellants' claim is clearly controlled by this precedent and thus constitutionally insubstantial.

The complaint in *Legion* alleged that the action was brought on behalf of all mentally ill Americans confined in public mental institutions. Plaintiff John Legion, like Walter Woe, was an involuntarily confined mentally ill black patient at Brooklyn State Hospital who attempted to challenge on equal protection and due process grounds the exclusion of state mental patients from the benefits of

Medicaid coverage under 42 U.S.C. § 1396d.[6] The *Legion* complaint also asked that the exclusion be declared unconstitutional.

The federal defendants cannot see how the appellants' attack on the Medicaid exclusion of state mental patients in the case at bar is in any way distinguishable from those claims in *Legion*. If *Legion* had been certified as a class action as Mr. Birnbaum (also counsel for plaintiffs in *Legion*) had requested, federal defendants would plead *res judicata* in this action. Indeed, when the district court at the hearing on the motion to determine the class asked appellants' counsel how the two cases differed, counsel responded to the effect that the evidence in the case at bar was stronger than in *Legion*.[7] This is not a legally significant distinction.

Not only is *Legion* legally and factually similar to the case at bar against the federal defendants, but it is also, as a summarily affirmed case, a binding precedent on this Court. A summary disposition of an appeal, whether by affirmance or by dismissal, is a decision on the merits of the case. *Ohio ex rel. Eaton* v. *Price*, 360 U.S. 246, 247 (1959). The recent Supreme Court decision in *Hicks* v. *Miranda*, 422 U.S. 332 (1975), unquestionably settles the issue that a summary disposition by the Supreme Court is binding precedent, and the Court

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[6] Even though the class Walter Woe sought to represent was limited to those patients between the ages of 21 and 65 in state mental hospitals, the district court noted that this class still constituted all state mental patients excluded from Medicaid benefits, as in *Legion*, since the statute 42 U.S.C. § 1396d was amended to provide coverage for those under 21 after the *Legion* case. *Woe* v. *Mathews*, *supra*, 408 F. Supp. at 424 n. 14.

[7] Appellants also raised this argument in their brief, pp. 66 to 69.

cited approvingly, at 422 U.S. 344, the rule first enunciated by the Second Circuit:

> . . . in *Port Authority Bondholders Protective Committee* v. *Port of New York Authority*, 387 F.2d 259, 263 n. 3 (1967), that "unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise"; and later in *Doe* v. *Hodgson*, 478 F.2d 537, 539 (CA 2), *cert. denied*, sub nom. *Doe* v. *Brennan*, 414 U.S. 1096 (1973), the lower courts are bound by summary decisions by this Court "until such time as the Court informs [them] that [they] are not."

The Fourth and Seventh Circuits have accordingly adhered to the *Hicks* holding. See, e.g., *Hogge* v. *Johnson*, 526 F.2d 833, 835 (4th Cir. 1975); *Russo* v. *Vacin*, 528 F.2d 27, 29 (7th Cir. 1976). Even the Ninth Circuit, which originally repudiated the precedential significance of summary affirmances, *Dillenburg* v. *Kramer*, 469 F.2d 1222, 1225 (9th Cir. 1972), now follows the rule in *Hicks*. *Matter of Northwest Homes of Chehalis, Inc.*, 526 F.2d 505, 506 (9th Cir. 1975).

Legion v. *Richardson* is doctrinally binding on lower courts, both in theory and in practice, and has been recognized as a controlling precedent by the district court below and by the District Court for the District of Columbia. *Kantrowitz* v. *Weinberger*, 388 F. Supp. 1127 (D.D.C. 1974). In the *Kantrowitz* case, Judge Gesell noted that the *Legion* court rejected the equal protection challenge to the Medicaid exclusion based on constitutional status and type of disease and declared that the "decision is, of course, binding on us." *Kantrowitz* v. *Weinberger*, *supra*, at 1129. Unlike the plaintiffs in

Kantrowitz, who further challenged the exclusion on the basis of age, the plaintiffs in the case at bar are clearly attacking only "the arbitrary, irrational and invidious Medicaid exclusion of most state mental hospital patients" (Amended complaint, p. 23)—an issue already settled by the *Legion* holding.

The appellants argue that *Legion* is not applicable because there now exists an "irrefutable mass" of sociological and medical evidence to show that the Medicaid exclusion results in arbitrary and invidious discrimination against the poor and the black.[8] However, this proposed evidence would weaken neither the reasoning nor the holding in *Legion*. The *Legion* court stated the controlling standard of review to use where public welfare legislation is challenged:

> It is not the function of this Court to evaluate congressional judgment. As the Supreme Court has recently advised: "[s]o long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straightjacket." *Jefferson* v. *Hackney*, 406 U.S. 535, 546, 92 S.Ct. 1724, 1731, 32 L.Ed.2d 285 (1972).

Legion v. *Richardson*, *supra*, 354 F. Supp. at 459. The court then found the Medicaid classification to be rational and not discriminatory. *Id.* Nowhere during the course of this suit have the appellants tried to challenge this finding or even allege a discriminatory motive on the part of Congress.[9] Thus, even if the appellants were to conclu-

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[8] Appellants' brief, page 59.

[9] In fact, the District of Columbia court found not only that the Medicaid legislation is rational but that it was the "obvious legislative intent" on the part of Congress to broaden assistance to include those not presently receiving institutional assistance. *Kantrowitz* v. *Weinberger*, *supra* at 1131.

sively prove discriminatory results from the Medicaid exclusion, the reasoning in *Legion* holds. As the Supreme Court recently reemphasized, absent a showing of discriminatory purposes, proof of a substantially disproportionate impact of a statute is insufficient to prove racial discrimination violative of the Equal Protection Clause. *Washington* v. *Davis*, 44 U.S.L.W. 4789, 4793 (U.S. June 7, 1976).

Given the precedential value of *Legion* in this Court and the identity of claims with the case at bar, the appellants' claim as against the federal defendants is rendered insubstantial and must be dismissed.

POINT II

The district court acted within its discretion in refusing to grant the plaintiffs leave to amend their complaint.

The district court refused to grant the plaintiffs leave to amend their complaint to add new plaintiffs, new defendants and new claims for relief (see Statement of the Case, supra, at pages 5 and 6). Even though Fed. Rule of Civil Procedure 15(a) dictates that leave must be granted as justice requires, this is a matter solely within the discretion of the trial court. *Zenith Radio Corp* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 33 (1971); *Foman* v. *Davis*, 371 U.S. 178, 182 (1962). Accordingly, the standard of review used by this Court in examining such decisions has been abuse of discretion. *Middle Atlantic Utilities Co.* v. *S.M.W. Development Corp.*, 392 F.2d 380 (2d Cir. 1968); *Crown Coat Front Co.* v. *United States*, 395 F.2d 160 (2d Cir. 1968). A critical factor in determining the occurrence of abuse is whether a justifying reason is given for refusing to grant leave to amend the complaint. *Foman* v. *Davis*, 371 U.S. 178, 182 (1962); *Middle Atlantic Utilities Co.* v. *S.M.W. Development Corp.*, 392 F.2d 380, 384 (1968).

2d Cir.

The defendants emphatically contend that the district court decision must be sustained, since not only were justifying reasons presented by the court but the reasons are sound. As the court correctly noted, the plaintiffs' proposed amendments would "unjustifiably interject entirely disparate issues and tend to obfuscate" the already complex issues present. *Woe* v. *Mathews*, *supra*, 408 F. Supp. at 431. The plaintiffs are essentially trying to add completely new issues, new plaintiffs and new defendants into this lawsuit in conjunction with their unsuccessful attempt to enjoin suspension of the SSI benefits last November. As the district court pointed out, "this new claim will be better examined in a separate action," *Id.* at 430, and there is no reason why the plaintiffs cannot proceed in a different action on these issues.

POINT III

The claim against the federal defendants is moot, and the order of the district court dismissing this claim is unappealable.

On January 30, 1976, notice of appeal was filed in this action. (Appellants' Appendix A-1, p. "C"). Six months after filing this appeal, the appellant-plaintiff, Walter Woe, died. (Appellants' Brief, p. 32). It is the contention of the federal defendants that upon the death of this plaintiff the claim against them became moot and abated.

First, class action status was not granted as to the claim against the federal defendants.[10] Consequently,

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[10] *Woe* v. *Mathews*, *supra*, 408 F. Supp. at 419. Since the action against the federal defendants was dismissed simultaneously with the certification of the class as to the causes of action remaining against the state defendants, class certification is not applicable to the claim against the federal defendants.

when plaintiff Walter Woe died, this part of the complaint was effectively extinguished. To continue any claim against the federal defendants without a complainant would only render any decision in this case academic.

Second, substituting a representative of the deceased plaintiff in the claim against the federal defendants would also be improper in this case. Whether a claim survives the death of a party for purposes of substitution under Rule 25(a) of FRCP depends on the substantive nature of the cause of action. *Fletcher* v. *Grinnell Bros.*, 64 F. Supp. 778 (E.D. Mich., 1946); *Schreiber* v. *Sharpless*, 110 U.S. 76 (1884). Absent a controlling statute, once a plaintiff dies, suits based on claims personal to the plaintiff abate on the theory that all rights die with him, while actions vindicating some right of property survive since such actions affect the decedent's estate. *Almour* v. *Pace*, 193 F.2d 699, 700 n. 2 (D.C. Cir. 1951).

In the present action, the very substance of the claim against the federal defendants and the relief prayed for demonstrate that this claim is a personal one. The complaint alleged that as a 26-year-old involuntarily civilly committed patient at Brooklyn State Hospital, Walter Woe had been the victim of a discriminatory system of health care in New York State, which had been aggravated by an unconstitutional Medicaid statute that excluded from coverage under the Medicaid Act inmates of state mental hospitals who are between the ages of 21 and 65. (Appellants' Appendix "B", p. 22). To remedy this allegedly inadequate system of medical care and treatment, plaintiff Walter Woe sought declaratory judgments stating that the exclusionary provisions of the Medicaid statute are unconstitutional and that state mental institutions should receive Medicaid benefits for

the care of patients between the ages of 21 and 65. Injunctions enforcing these declaratory judgments were also sought to insure an adequate level of medical care in state mental hospitals. (Appellants' Appendix "B", p. 57).

It is obvious from this claim for relief against the federal defendants that plaintiff Walter Woe was seeking to vindicate an individual or personal right and that only he would have been affected by a grant or denial of the declaratory and injunctive relief prayed for in the complaint. Although the estate of Walter Woe would arguably benefit by the payment of the compensatory and punitive damages in the amount of $20,000.00 sought in the complaint (Appellants' Appendix "B", p. 57), such damages are not recoverable from the federal defendants in this case. Insofar as the complaint seeks compensatory damages from the federal defendants in what appears to be a tort claim,[11] it is deficient in that there is no allegation contained in the complaint that appellants presented their claim to the Department of Health, Education and

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[11] Assuming plaintiffs' demand for compensatory damages is against David Mathews individually and as Secretary of HEW, such claim is in effect a suit against the United States which the courts have no jurisdiction to entertain without consent. See *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F.2d 451 (D.C. Cir.), *cert. denied*, 382 U.S. 978 (1965). In addition, plaintiffs' complaint contains no allegation that the Secretary's actions were beyond the outer perimeter of his line of duty and, therefore, he personally is immune from suit. See *Barr* v. *Matteo*, 360 U.S. 564 (1959).

If plaintiffs' demand for compensatory damages is founded upon a claim in contract, such cause of action would also fail since 28 U.S.C. § 1346(a)(2) grants jurisdiction to the district courts only for contract claims which do not exceed $10,000 in amount, and the complaint contains no allegations relating to a contract between the parties.

Welfare for final disposition as required by Title 28, United States Code, section 2675. See *Altman* v. *Connally*, 456 F.2d 1114 (2d Cir. 1972). Furthermore, the Federal Tort Claims Act also provides that punitive damages are not recoverable as against the United States. 28 U.S.C. § 2674.

In light of the personal nature of the claim against the federal defendants and the impossibility of effective relief, this claim should be considered moot and abated for purposes of Rule 25(a) of FRCP. See *Stroud* v. *Mayden*, 35 F.R.D. 378 (W.D. Mo. 1964).

The federal defendants further contend that the district court's order dismissing plaintiffs' complaint as against them does not constitute a final and appealable judgment under Rule 54(b) of FRCP.

The United States courts of appeals have jurisdiction to review all "final decisions" of the district courts. 28 U.S.C. § 1291. A decision is final, and thus appealable, if the district court renders a judgment "not only as to all the parties, but as to the whole subject matter and as to all causes of action involved." *Turtle* v. *Institute for Resource Management, Inc.*, 475 F.2d 925 (D.C. Cir. 1973). When an action involves multiple claims or parties, however, the district court, pursuant to Rule 54(b) of FRCP, may render a final judgment on less than all claims presented provided that it makes (1) "an express determination that there is no just reason for delay" and (2) "an express direction for the entry of judgment."

In the present action, which includes more than one claim for relief, the district court's order dismissing the complaint as against only the federal defendants was an interlocutory judgment. Still pending is one of appellants' actions against the state defendants, and the district court neither made a determination that there was no

reason for delay nor directed the entry of final judgment as required by Rule 54(b). *Lane* v. *Graves*, 518 F.2d 965 (8th Cir. 1975); *Lehrer* v. *McCloskey Homes, Inc.*, 242 F.2d 190 (3d Cir. 1957); *Scarf* v. *Trans World Airlines*, 233 F.2d 176 (2d Cir. 1956); *Arlinghouse* v. *Ritenour*, — F.2d — (2d Cir. Docket No. 75-7616, decided October 26, 1976). Consequently, the decision of the district court granting the federal defendants their motion to dismiss for lack of subject matter jurisdiction is not final, and, therefore, this Court is without jurisdiction to consider plaintiffs' appeal.[12]

CONCLUSION

The district court's order granting the federal appellees' motion dismissing the complaint should be affirmed.

Dated: Brooklyn, New York
November 12, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
CYRIL HYMAN,
Assistant United States Attorneys,
*Of Counsel.**

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[12] Nevertheless, should this Court entertain the appeal, the federal defendants are asking that the order of the district court dismissing the complaint be affirmed.

* The United States Attorney's Office wishes to acknowledge the assistance of Marilyn Go and Karen Sclafani. Ms. Go is a third year law student at Harvard Law School and Mrs. Sclafani is a third year law student at New York University School of Law.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

CAROLYN N. JOHNSON, being duly sworn, says that on the 12th day of November, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~a~~ Two copies of the BRIEF FOR THE FEDERAL APPELLEES of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Hon. Louis Lefkowitz
State Attorney General
Two World Trade Center
New York, New York

Morton Birnbaum, Esq.
225 Tompkins Avenue
Brooklyn, New York

Sworn to before me this
12th day of November, 1976

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24 3480350
Qualified in Kings County
Commission Expires March 30, 1977

Carolyn N. Johnson
CAROLYN N. JOHNSON